

"waste" Commission resources: the Commission is currently unable to conduct comparative hearings between mutually exclusive applications and thus does not expend resources in evaluating those applications. Furthermore, the Marquette Application did not prejudice any applicants for the Marquette Station since, at the time that Scanlan filed its application for the vacant UHF allotment, there were no such other applicants.

Finally, and perhaps most importantly, the purpose of the Marquette Application was to expedite (and clearly not to delay) the onset of new television service to viewers in the Marquette/Ishpeming area. The historical lack of interest in the Channel 19 allotment and the availability of other UHF allotments to Marquette led Scanlan to reasonably conclude that no other broadcasters would file competing applications to construct the Marquette Station and, as a result, that initiation of television service to viewers in the Marquette/Ishpeming area would be expedited. Thus, the filing of the Marquette Application clearly was not inconsistent with the objectives of the Inconsistent Application Rule; if anything, it served to advance the fundamental objective of expediting the provision of new television service to viewers in Michigan's Upper Peninsula. Under such circumstances, the Commission should reject Iacobelli's argument that the Inconsistent Application rule warrants dismissal of the Marquette Application.⁵

5. That the Commission has authority to make exceptions to rigid application of its rules in circumstances such as those at issue in this proceeding is clear. The Commission's "discretion to proceed in difficult areas through general rules is intimately linked to the existence of a safety valve procedure for consideration of an application for exemption based on special circumstances." *In re Applications of Radio Representatives, Inc. et al*, 5 F.C.C.Rcd. 1894, 1896 (1990) (quoting *WAIT Radio v. FCC*, 418 F. 2d 1153, 1157 (D.C. Cir. 1969)) (refusing to rigidly apply Multiple Application Rule where applicant had agreed to dismiss inconsistent application). It is appropriate to extend such a safety valve to "an applicant who proposes a new service that will not undermine the policy, served by [a] rule, that has been adjudged in the public interest." *Id.* Just last year the Commission recognized that its inability to process mutually exclusive applications justified a temporary

II. THE FILING OF THE MARQUETTE APPLICATION DURING THE PENDENCY OF THE CALUMET APPLICATION AND THE CRANDON APPLICATION DID NOT VIOLATE THE INCONSISTENT APPLICATION RULE

Iacobelli also contends that the Marquette Application is inconsistent with the Calumet Application and the Crandon Application. Exhibit B to the originally filed Marquette Application specifically acknowledges the Grade B contour overlap with the Calumet Station, and states that the Calumet Station and Marquette Station would be operated in tandem. Exhibit B to the Marquette Application was amended on April 5, 1996 to further elaborate Scanlan's intentions by proposing operation of the Calumet Station (for which a construction permit had recently been granted) as a satellite of the Marquette Station. A detailed public interest showing was made in support of the satellite proposal. The Inconsistent Rule is clearly inapplicable as to the Marquette Application with respect to the Calumet Application since both applications could (and still can) be granted under the Commission's rules.

The same is true with respect to the Crandon Application. Although the originally filed Marquette application acknowledged the pendency of the Crandon application, it did not, due to an oversight, reference the predicted Grade B contour overlap between the Marquette Station and the Crandon Station. However, the amendment to the

waiver of its rules limiting payments to dismissing applicants pursuant to settlement agreements in comparative broadcast proceedings. *See FCC Waives Limitations on Payments to Dismissing Applicants in Universal Settlements of Cases Subject to Comparative Proceedings Freeze Policy*, Public Notice 95-391 (September 15, 1995) (recognizing that the delays resulting from the *Bechtel* decision "have caused hardship to [applicants in comparative broadcast proceedings] and also disserved the public interest by impeding the initiation of new broadcast services"). Clearly, the same logic is applicable in this proceeding--the Commission should reject Iacobelli's efforts to invoke the Inconsistent Application Rule for the purpose of impeding the initiation of new television service to viewers in Marquette.

Marquette Application filed April 5, 1996 acknowledged this overlap and requested a waiver of the Commission's multiple ownership rules. In any event, Scanlan will, through a separate pleading, seek the Commission's leave to dismiss the Crandon Application. The issue of whether the Marquette Application is consistent with the Crandon Application is therefore moot.⁶

III. THE FILING OF THE MARQUETTE APPLICATION DID NOT VIOLATE THE MULTIPLE APPLICATION RULE

Iacobelli argues that the Marquette Application should also be dismissed under the Multiple Application Rule, 47 C.F.R. 73.3520. The Multiple Application Rule prohibits applications "for new or additional facilities for a station of the same class to serve the *same community of license*" from being filed by the same applicant. 47 C.F.R. 73.3520 (emphasis added). Scanlan currently has outstanding only one application to serve the community of Marquette. That Ishpeming or any other city may have geographical proximity to Marquette is irrelevant. The Marquette Application clearly does not violate the Multiple Application Rule.

IV. THE PRIMARY MOTIVATION BEHIND IACOBELLI'S PETITION APPEARS TO BE TO THWART COMPETITION, NOT TO FURTHER THE PUBLIC INTEREST

A close examination of the history of the Marquette and Ishpeming proceedings casts serious questions as to Iacobelli's motivation for filing a competing application for the Marquette Station and the Petition and Supplement against Scanlan. The Channel 19 allotment for the Marquette Station has been vacant for years, yet only when

6. Iacobelli's petition to deny the Crandon Application is also mooted by Scanlan's intention to withdraw the Crandon Application. That aspect of the Petition is therefore not addressed herein.

Scanlan, an affiliate of Iacobelli's main competitor in Traverse City and Sault Ste. Marie, sought to initiate new television service for viewers in Marquette did Iacobelli show any interest whatsoever in constructing a television station to serve Marquette. Moreover, Iacobelli chose to file a competing application against Scanlan (which Iacobelli, as an experienced licensee, unquestionably knows will indefinitely delay the proceedings relating to the Marquette Station) despite the availability of numerous other UHF channels that could be allotted to Marquette.⁷

But Iacobelli was apparently not satisfied to simply file a competing application against Scanlan. Instead he chose to file the Petition and Supplement not only to challenge the legal merits of Scanlan's applications, but also to use the Commission's process as a platform for launching spurious and unsubstantiated allegations against Scanlan. For example, in the Petition, Iacobelli argues that Scanlan's filing of the Marquette Application and Crandon Application "seriously calls into question Scanlan's qualifications as to its character to be a Commission licensee." Petition at 7 n.13.

Moreover, Iacobelli maintains that it is "impossible to accept that Scanlan had a good faith

⁷ It is also noteworthy that one of the competing applicants in the Ishpeming proceeding, William Kring, is the Vice President, Secretary, Treasurer and Chief Financial Officer of Heritage Broadcasting Company of Michigan, which is owned by Iacobelli and is the licensee of the television stations with which Scanlan's affiliate competes in the Traverse City and Sault Ste. Marie markets. See Exhibit A of Iacobelli Application. The Iacobelli Application acknowledges that Kring has an application on file in the Ishpeming proceeding. It further explains that in the event the Iacobelli Application is granted, Kring will "disassociate himself from all attributable interests" in Iacobelli's Cadillac and Sault Ste. Marie television stations. That Iacobelli can flatly assert what actions Kring will take in the future without any supporting documentation from Kring himself raises serious questions as to whether Kring acted on his own or at the behest of Iacobelli in filing his application for the Ishpeming Station. Scanlan recognizes, however, that this Opposition to the Petition and Supplement is not the appropriate forum for fully exploring whether Kring's application for the Ishpeming Station and Iacobelli's application for the Marquette Station are strike applications. These issues will be raised at the appropriate time.

belief that, taken together, the four applications discussed herein were legitimately filed."

Id. In the Supplement, Iacobelli continues the mudslinging:

Given the proximity of the communities of license of the four applications involved, and given that the same engineer prepared all four applications for an experienced broadcast licensee, to be reviewed and filed by a law firm with a wealth of experience in FCC matters, it is hard to countenance that the predicted contour overlaps cited in the Petition to Deny came as a surprise to anyone involved with the Crandon Application and the Marquette Application. . . . The above sense of incredulity is bolstered by Scanlan's manifest willingness to play fast and loose with the Commission's Rules. . . . [I]t is notable that (1) the amendment certification signed by Scanlan was faxed to him on April 2, 1996, two days *before* the filing of the Petition to Deny which Scanlan claims put him on notice of the various unrecognized overlaps between applications, and (2) Scanlan, a Michigan resident, somehow managed both to sign that certification *and* have it filed in Washington on the same day, April 5, 1996.

Supplement at 4-5 n.9.

Scanlan believes that a response to these allegations is warranted. As the discussion above makes clear, Scanlan filed the Marquette Application only after the Commission's staff informed Scanlan's counsel of its view that such a filing would be permissible notwithstanding the pending Ishpeming Application. Furthermore, as Scanlan readily acknowledged in the amendment to the Marquette Application and the second amendment to the Crandon Application⁸ (each filed April 5, 1996), the originally filed Crandon Application and Marquette Application should have made reference to the Grade B contour overlap that would exist between the Crandon Station and the Calumet, Ishpeming and Marquette Stations.⁹

8. A first amendment to the Crandon Application, which specified a different transmitter site, was filed on April 4, 1996.

9. Contrary to Iacobelli's clear implication, however, this reference was not omitted as part of a grand conspiracy between Scanlan, its counsel and its engineers to cover up predicted contour overlaps. Instead, Scanlan, its counsel and its engineers simply made a mistake. They regret the oversight, and the mistake was corrected just hours after they

Iacobelli's accusation that submitting amendments to the applications on April 5, 1996 with signature pages that were faxed to Scanlan on April 2, 1996 constitutes "playing fast and loose" with the Commission's rules is absurd and even more indicative of what appears to be the primary motivation behind the filing of the Petition and the Supplement. It is true that signature pages for the amendments to the Crandon and Marquette Applications were faxed to Scanlan, along with drafts of those amendments, on April 2, 1996. Obviously, when counsel for Scanlan was served with Iacobelli's Petition on April 5, 1996, Scanlan recognized that each amendment should acknowledge and address the overlaps that had been overlooked. Scanlan reviewed and approved both the second amendment to the Crandon Application and the amendment to the Marquette Application before they were filed with the Commission. While Iacobelli should be commended for scrutinizing Scanlan's filings with the Commission so closely so as to not miss transmission dates on facsimile signature pages, he would be well advised to refine his investigative skills before he undertakes to launch unsubstantiated and false allegations at his main competitor in the future.

Iacobelli's Petition and Supplement raise serious questions as to whether Iacobelli has used the Commission's process for improper purposes. Regardless of his motive, however, Iacobelli should not be permitted to succeed in his efforts to stall the initiation of new television service to viewers in Michigan's Upper Peninsula. The Commission should reject Iacobelli's Petition and Supplement.

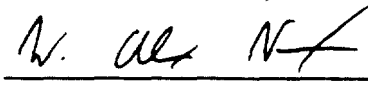
became aware of it.

Respectfully submitted,

SCANLAN TELEVISION, INC.

Dated: May 15, 1996

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CERTIFICATE OF SERVICE

I, Susan Guzo, do hereby certify that on this 15th day of May, 1996 a copy of the foregoing *Opposition to Petition to Deny* was served by U.S. Mail, first class, postage prepaid to the following:

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Susan Guzo

EXHIBIT D

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of)	
)	
SCANLAN TELEVISION, NC.)	
)	
For Permit to Construct a New)	FCC File No. BPCT-950915KI
Television Station at VHF Channel 4)	
Crandon, Wisconsin)	
)	
For Permit to Construct a New)	FCC File No. BPCT-960111KO
Television Station at UHF Channel 19)	
Marquette, Michigan)	

TO: Chief, Video Services Division

REPLY TO OPPOSITION TO PETITION TO DENY

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May 28, 1996

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SUMMARY

The applications of Scanlan Television, Inc. ("Scanlan") for new commercial television stations on Channel 4, Crandon, Wisconsin, and Channel 19, Marquette, Michigan (the "Crandon Application" and the "Marquette Application," respectively), violate § 73.3518 and § 73.3520 of the Commission's Rules (the "Inconsistent Application Rule" and the "Multiple Application Rule," respectively) and must therefore be dismissed. The framework created by the Inconsistent Application Rule and the Multiple Application Rule, when coupled with § 73.3555(b) of the Commission's Rules (the "Television Duopoly Rule"), bars an applicant from filing, without seeking at the time of filing appropriate waivers of the Commission's Rules, applications for two or more stations if either the proposed Grade B signals of the stations would overlap or the stations propose to serve the same community.

The Marquette Application violates both the Inconsistent Application Rule and the Multiple Application Rule. As between the Ishpeming Application and the Marquette Application, the predicted *City Grade contour overlap* of the two stations would be 97%, the overlap between the Grade A contours of the stations would be 99.9%, and the overlap between the Grade B contours 100%. Thus, the two applications propose to serve the same community in violation of the Multiple Application Rule. Moreover, the Marquette Application as originally filed stated that the Grade B contours of the Marquette and Ishpeming Applications would overlap and that there would be Grade B contour overlap between the Marquette Application and the Calumet Application, (Marquette Application at Exhibit B), but the Marquette Application did not contain any request for a waiver of the Television Duopoly Rule. Upon the filing of a Petition to Deny the Marquette and Crandon

Applications, the Marquette Application was amended to recognize some of the overlaps between it and Scanlan's other pending applications and purported to seek the necessary waivers of the Commission's Rules. Nevertheless, despite the filing of such waivers by amendment, and despite Scanlan's claims in its Opposition to the Petition to Deny that it had secured the Commission Staff's informal permission to file the Marquette Application during the pendency of the Ishpeming Application's status as deadlocked in comparative hearing, the Marquette Application violated the Inconsistent Application Rule and the Multiple Application Rule. In that such violations, under Commission precedent, cannot be cured by amendment to the offending application, the Marquette Application must be dismissed.

The Crandon Application violates the Inconsistent Application Rule. At the time the it was filed, the application did not disclose that the predicted Grade A contour of that application would overlap with the predicted Grade B contour of Scanlan's pending application for Ishpeming Channel 10 ("Ishpeming Application"); that the Crandon Application's predicted Grade B contour would overlap with the predicted City Grade Contour of the Ishpeming Application, that the predicted Grade B contour of the Crandon Application would overlap that of the Ishpeming Application, or that the predicted Grade B contour of the Crandon Application would overlap that of Scanlan's then-pending and now-granted application for a new television station on Channel 5, Calumet, Michigan ("Calumet Application"). Following the filing of the Petition to Deny, Scanlan amended its Crandon Application to disclose some of the predicted overlaps and to seek waiver of the Television Duopoly Rule for certain of those overlaps. Scanlan has since pledged, in its Opposition to the the Petition to Deny, to seek the voluntary dismissal of the Crandon Application.

Before the
FEDERAL COMMUNICATIONS COMMISSION
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Television Station at UHF Channel 19)	
Marquette, Michigan)	

TO: Chief, Video Services Division

REPLY TO OPPOSITION TO PETITION TO DENY

Mario F. Iacobelli ("Iacobelli"), an applicant for Channel 4, Crandon, Wisconsin, and Channel 19, Marquette, Michigan, by his attorneys, pursuant to 47 C.F.R § 73.3584(b), hereby files a Reply to the May 15, 1996, Opposition ("Opposition") of Scanlan Television, Inc. ("Scanlan"), responding to Iacobelli's Petition to Deny both the above-referenced applications ("Petition to Deny").¹ Because the Opposition fails to show that the two subject applications comply with §§ 73.3518 and 73.3520 of the Commission's Rules (the "Inconsistent Application Rule" and "Multiple Application Rule," respectively), the Commission should dismiss the applications, in support of which, the following is respectfully submitted:

BACKGROUND

1. At the time Scanlan filed the presently contested applications for construction permits for new commercial television stations on Channel 4 in Crandon, Wisconsin

1. Scanlan's Opposition, pursuant to two requests for extension of time, was timely filed May 15, 1996. Thus pursuant to §§ 73.3584(b), 1.45 and 1.4(h) of the Commission's rules, this Reply is timely filed.

("Crandon Application"),² and Channel 19 in Marquette, Michigan ("Marquette Application"),³ Scanlan had pending before the Commission an application for a construction permit for a new commercial television station on Channel 10 in Ishpeming, Michigan ("Ishpeming Application"),⁴ and a now-granted application for a construction permit for a new commercial television station on Channel 5 in Calumet, Michigan ("Calumet Application").⁵ At the time it was filed, the Crandon Application neither acknowledged the various contour overlaps⁶ that would exist between the facilities proposed by the Crandon Application and those proposed by both the Ishpeming Application and the then-pending Calumet Application,⁷ nor requested a waiver of the Television Duopoly Rule, 47 C.F.R.

2. FCC File No. BFCT-950915KI.

3. FCC File No. BFCT-960111KO.

4. FCC File No. BFCT-941116KH.

5. FCC File No. BFCT-950412KF. The Calumet Application was granted with the caveat that the satellite waiver request contained therein (due to the overlap between the Ishpeming Application and the Calumet Application) will be considered in connection with the Ishpeming Application. See Letter of March 6, 1996, from Barbara A. Kreisman, Chief, Video Services Division. In light of that caveat, the Commission granted the Calumet Application conditioned upon Scanlan constructing a main studio within its principal community contour due to the possibility that the Ishpeming Application may not be granted. Id. at 1 n.1. The Calumet Application was also granted without acknowledgment of the overlap with the Crandon Application. See Petition to Deny at 3 n.9 and accompanying text.

6. All overlaps referred to in this Reply may be verified by reference to the Engineering Statement appended to the Petition to Deny filed by Iacobelli on April 4, 1996.

7. The facilities proposed by the Crandon Application would create overlap between (1) the predicted Grade A contour of Crandon Channel 4 and the predicted Grade B contour of Ishpeming Channel 10, (2) the predicted Grade B contour of Crandon Channel 4 and the City Grade Contour of Ishpeming Channel 10, (3) the predicted Grade B contours of the Crandon and Ishpeming stations, and (4) the predicted Grade B contours of Crandon Channel 4 and Calumet Channel 5.

§ 73.3555(b), even though that rule would otherwise prohibit common ownership of the stations proposed by those three applications. The Marquette Application as originally filed stated that "[t]he Grade B contour of the station proposed in the Ishpeming Application would overlap the Grade B contour of the station proposed in th[e Marquette] Application," but it did not contain any request for a waiver of the Television Duopoly Rule.⁸ The Marquette Application also recognized that "[t]here is . . . Grade B contour overlap between the station proposed in th[e Marquette] Application and the Calumet Station[.]" Marquette Application at Exhibit B.⁹ The Marquette Application did not recognize that the predicted Grade B contour of the facilities specified in the Crandon Application would overlap with the predicted City Grade, Grade A and Grade B contours of the facilities specified in the Marquette Application, nor did it reveal extent of overlap between the facilities specified in the Ishpeming Application and the facilities specified in the Marquette Application.¹⁰

2. On April 3, 1996, Iacobelli filed applications for construction permits for new television stations for Channel 4, Crandon, Wisconsin, and Channel 19, Marquette, Michigan,

8. In fact, the Marquette Application did the opposite of requesting a waiver when it stated that "[a]t such time as the Ishpeming Application may be granted (or, if necessary, when it appears that the Ishpeming matter may proceed to hearing), Scanlan or its affiliate will take such steps as are necessary to comply with the Commission's multiple ownership rules then in effect." Marquette Application at Exhibit B.

9. Once again, the Marquette Application did the opposite of requesting upfront a waiver of the Television Duopoly Rule, stating, "[i]f Applicant becomes the licensee of the Calumet Station, it plans to operate the Calumet Station in tandem with the Marquette Station, and will, if necessary, request an appropriate waiver of the Commission's multiple ownership rules at the appropriate time." Marquette Application at Exhibit B.

10. The predicted *City Grade contour overlap* of the two stations would be 97%, the overlap between the Grade A contours of the stations would be 99.9%, and the overlap between the Grade B contours 100%.

that are mutually exclusive with, respectively, Scanlan's Crandon Application and Marquette Application. Iacobelli subsequently filed a Petition to Deny the Crandon Application and the Marquette Application on grounds that they violated the Commission's Inconsistent Application Rule and Multiple Application Rule due to their failure to include requests for waivers of the various unrecognized contour overlaps set forth above. This resulted in Scanlan's April 5, 1996, filing of amendments to the Crandon Application ("Crandon Amendment") and the Marquette Application ("Marquette Amendment"). Iacobelli then filed a Supplement to Petition to Deny ("Supplement") addressing the new information presented by the Crandon and Marquette Amendments. On May 15, 1996, Scanlan filed its Opposition to Iacobelli's Petition to Deny and Supplement to Petition to Deny.

ARGUMENT

3. The Commission's Rules set forth a relatively straightforward framework to govern the number and nature of applications for new facilities any putative applicant may file. The Television Duopoly Rule bars common ownership of two or more stations whose Grade B contours overlap.¹¹ The Inconsistent Application Rule prevents the filing of, *inter alia*, multiple applications seeking authorizations which could not all be granted under the Commission's Rules (including the Television Duopoly Rule). And, the Multiple Application Rule prevents the filing of multiple applications for new or modified facilities for the same class of station to serve the same community.¹² Unlike many of the other complex,

11. Of course, under certain circumstances, a party may seek to own, operate or control two or more such stations by requesting that the Commission waive the rule.

12. Unlike the Television Duopoly Rule, see supra note 11, the Inconsistent Application Rule and the Multiple Application Rule may not be satisfied by seeking a waiver at a time after an offending application is filed. See infra note 17 and ¶ 11.

interlocking sections of the Commission's Rules, there is no guesswork involved with these rules, nor do they create any "gray" areas -- either an applicant complies or fails to comply with the above-stated rules. Scanlan's Crandon Application¹³ and Scanlan's Marquette Application quite simply fail to comply and should therefore be dismissed.¹⁴

Multiple Application Rule

4. The Marquette Application violates the Multiple Application Rule. Nevertheless, Scanlan's Opposition attempts to demonstrate that the Marquette Application complies with the rule. Unfortunately, Scanlan's Opposition attempts to do so by misquoting the rule thusly: "The Multiple Application Rule prohibits applications 'for new or additional facilities for a station of the same class to serve the *same community of license*' from being filed by the same applicant." Opposition at 8 (emphasis added) (citation omitted). The Multiple Application Rule, however, does not bar applications for new facilities for stations "to serve the same **community of license**," but rather those proposing "to serve the same

13. The Opposition states that "Scanlan will, through a separate pleading, seek the Commission's leave to dismiss the Crandon Application. The issue of whether the Marquette Application is consistent with the Crandon Application [and Iacobelli's petition to deny the Crandon Application] is therefore moot." Opposition at 8 and n.6. Because Scanlan is bound by this representation to the Commission, see 47 C.F.R. § 73.1015, this Reply will treat the Crandon Application as if it has already been dismissed.

It should be noted, however, that the dismissal of the Crandon Application does not remedy Scanlan's violation of the Inconsistent Application Rule created by the concurrent filing of the Crandon Application and the Marquette Application, without a request for waiver of the Television Duopoly Rule, specifying facilities that would create Grade B overlap between the two stations. In addition, Iacobelli at this time requests that the Commission grant Iacobelli the right to subsequently supplement this Reply in the event Scanlan fails to have the Crandon Application dismissed.

14. As detailed in Iacobelli's Petition to Deny at ¶ 9 and the Supplement at ¶ 6, Scanlan's sundry violations of the Inconsistent Application Rule and Multiple Application Rule may not be remedied by subsequently amending the offending applications. Thus, as to the last-filed Crandon and Marquette Applications, the appropriate remedy is dismissal.

community." While this is a subtle semantic distinction, it is one of legal significance -- "community of license" is a term of art specifying the town to which a broadcast facility is licensed, whereas "community" refers to a specific area which may in fact encompass several closely situated communities of license.¹⁵

5. Such is the case with Marquette and Ishpeming, two cities located approximately ten miles apart but within the same "community." Indeed, even in the Opposition, Scanlan consistently refers to this community as "the Marquette/Ishpeming area." Opposition at 2, 3. As such, anyone filing applications for new facilities of the same service to serve both these cities would violate the Multiple Application Rule. The most damning evidence in support of this is the fact that the facilities proposed by Scanlan's Ishpeming and Marquette Applications would create predicted City Grade overlap between the two stations of 97%, Grade A overlap of 99.9%, and 100% Grade B overlap. Hence, Scanlan's Marquette Application, having been filed subsequent to Scanlan's pending Ishpeming Application, violates the Multiple Application Rule and must be dismissed.

Inconsistent Application Rule

6. Scanlan's altruistic intentions notwithstanding, see Opposition at 2 ("Scanlan has sought to further the public interest by initiating badly needed service to [Marquette]"), the Marquette Application is simply not acceptable for filing under the Inconsistent Application Rule given the pendency of the Ishpeming Application and Scanlan's ownership of the Calumet construction permit. The Television Duopoly Rule bars Scanlan from owning,

15. If a contrary interpretation were accepted, it would be permissible for an applicant to file applications, for example, for new facilities for Brooklyn, the Bronx, Manhattan, Queens, and Staten Island without running afoul of the Multiple Application Rule.

operating or controlling two television stations whose Grade B contours overlap. As such, Scanlan may not own two television stations whose contours (Grade B, Grade A and City Grade) are practically coextensive. Nor may Scanlan own, in the absence of a waiver of the rule, two stations whose Grade B contours overlap, as do those of the Marquette Application and the Calumet Application. Hence, the Marquette Application, as the last-filed of the three above applications, must be dismissed under the Inconsistent Application Rule as well.

7. Scanlan's suggestion that it obtained the unofficial consent of certain unnamed and unspecified members of the Commission's staff before filing the Marquette Application during the pendency of the Ishpeming Application, Opposition at 3, 5, is irrelevant. The Commission's Staff may not waive the Commission's Rules, 47 C.F.R. § 0.283(a)(1), and the Staff's opinion as to the permissibility of some constituent's proposed action must nevertheless be subject to challenge upon the commencement of such action. Such alleged consent does not render Scanlan's applications acceptable for filing under the Commission's Rules.

8. It is also irrelevant that Scanlan's filing of the Marquette Application may have in some way been within the spirit of the Inconsistent Application Rule.¹⁶ Opposition at 5-6.

16. Even if simply being within the spirit of the Rules were enough to render an application acceptable for filing, Scanlan does not even achieve that. Contrary to Scanlan's protestations, Opposition at 6 ("the Marquette Application did not prejudice any applicants for the Marquette Station since, at the time Scanlan filed its application for the vacant UHF allotment, there were no such other applicants"), the Marquette Application does create prejudice.

The applicants whom the Inconsistent Application Rule is designed to protect are not only those that may be mutually exclusive with the later filed inconsistent application but also those applicants mutually exclusive with the already-on-file application. For example, in the current case, it would be the mutually exclusive applicants for the Ishpeming allotment who would be prejudiced if Scanlan's Marquette Application were granted, for Scanlan, as permittee of Channel 19 in Marquette, would then have incentive to refuse to settle and/or to draw out the Ishpeming proceeding as long as possible (and indefinitely if it was within Scanlan's power to do so) to allow him to serve the Ishpeming/Marquette market without competition

(continued...)

When a party seeks to take action before the Commission that the party believes to be within the spirit of the Commission's Rules despite technically violating those Rules, it is incumbent upon that party to seek, from the Commission, a waiver of that applicable rules to allow the action.¹⁷ That is, in fact, the whole reason behind the Commission's power to grant waivers of its Rules. See, e.g., WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir 1969) ("agency's discretion to proceed in difficult areas through general rules is intimately linked to the existence of a safety valve procedure for consideration of an application for exemption based upon special circumstances"). The only thing that matters in the instant case is that the Marquette Application could not be granted given the pendency of the Ishpeming Application and, absent a waiver, ownership of the Calumet construction permit.

9. Scanlan's Marquette Application, as demonstrated in the Petition to Deny, Supplement to Petition to Deny, and above, is clearly inconsistent, for purposes of the Inconsistent Application Rule, with Scanlan's pending Ishpeming Application. This state of affairs does not change simply because the Ishpeming Application is currently deadlocked in a

16. (...continued)
from the station proposed by the mutually exclusive applications for Channel 10, Ishpeming, which action would clearly be contrary to the public interest.

17. Scanlan's own Opposition supports this position. At Note 5, the Opposition explains all the good reasons why the Commission has maintained a fair-minded waiver policy. However, the key aspect of any waiver policy is that the party not in conformance with the rules actually request a waiver, as is indicated by the precedents cited in the above-specified note. In fact, even when the Commission grants a waiver of its Rules on its own motion, see Opposition at 6 n.5 (quoting Applications of Radio Representatives, Inc., 5 FCC Rcd 1894, 1896 (1990)) the Rules are waived not merely ignored.

Scanlan just flat out opted not to include all the waiver requests necessitated by the pending status of his various applications. Thus, consistent with Commission precedent, Scanlan's last-filed, offending application(s) must be dismissed. See Premier Broadcasting, Inc., 7 FCC Rcd 867, 870 (1992).

comparative hearing with mutually exclusive applications. The contours proposed by those applications are practically coextensive, and even had a waiver been requested (and it wasn't), both applications could not have been granted under the Commission's Rules and precedents.

10. The Marquette Application is also inconsistent with the Calumet Application. This remains true despite Scanlan's attempt to incorporate a satellite waiver request, via amendment, into the Marquette Application. First, amending the Marquette Application to seek a waiver of the Television Duopoly Rule under the satellite exception does not remedy the Inconsistent Application Rule violation created by the original filing of the Marquette Application being inconsistent with the Calumet Application. See Big Wyoming Broadcasting Corp., 2 FCC Rcd 3463 (1987). More importantly even the Marquette Amendment's waiver request cannot remedy the inconsistency between the Marquette and Calumet Applications. In fact, the Amendment merely underscores the inconsistencies between Scanlan's three remaining Applications (after the voluntary dismissal of the Crandon Application). The Commission granted the Calumet Application based upon that station, the proposed Grade B signal of which would overlap that of the Ishpeming Application, being a satellite of the Ishpeming station. The satellite exception to the Television Duopoly Rule does not contemplate the station for which the waiver is granted being the satellite of two stations with whom it has a Grade B overlap (let alone two stations whose signals overlap as well, as do those of the Ishpeming and Marquette Application). Nevertheless, both Scanlan's Ishpeming Application, see supra, note 5, and Scanlan's Marquette Application, Opposition at 7, currently contain satellite waiver requests specifying parent-satellite operation with the Calumet Application. Thus, it is indisputable that the Marquette Application violates the Inconsistent Application Rule as regards both the Ishpeming and Calumet Applications.

11. Moreover, Scanlan's subsequent amendment of the Marquette Application to request the appropriate waivers of the Commission's Rules or his promise to "take such steps as are necessary to comply with the Commission's multiple ownership rules then in effect," Marquette Application at Exhibit B, do not make the Marquette Application any less subject to dismissal. To avoid violating the Inconsistent Applications Rule, Scanlan was required, *at the time the Marquette application was tendered*, to request a waiver of the Television Duopoly Rule given that there was overlap between the facilities proposed by his commonly owned applications. New Life Enterprises, Inc., 7 FCC Rcd 843 (1992). His failure to do so may not be corrected by amendment, because an amendment "cannot correct a violation which has already occurred." Big W.oming., 2 FCC Rcd at 3493 (the gravamen of the violation of rules such as that barring inconsistent or multiple applications is "*the filing of the inconsistent application itself*" and such violation can never be cured by subsequent amendment because the act of filing cannot be undone.") (emphasis in original). Thus, because the Marquette Application contained no waiver request at the time it was filed (and even by amendment can not proffer a plausible waiver request given the extent of overlap with the Ishpeming Application), the Marquette Application must be dismissed. See Premier Broadcasting, Inc., 7 FCC Rcd 867, 870 (1992).

Motivational Questions

12. Scanlan, in addition to making a failed attempt to demonstrate compliance with the Multiple Application Rule and the Inconsistent Application Rule, uses the Opposition to cast spurious aspersions toward Jacobelli's intent in filing applications for Crandon and Marquette and the Petition to Deny Scanlan's Crandon and Marquette Applications. The sole

basis of these accusations seems to be the wholly irrelevant fact that Iacobelli owns stations in Cadillac and Sault Ste. Marie, Michigan, while Scanlan owns stations in Traverse City, and Sault Ste. Marie, Michigan.¹⁸ While Scanlan claims as grounds questioning Iacobelli's intent the fact that Iacobelli dared file competing applications against Scanlan, Iacobelli's exercise of his right to file application during filing windows open for the only allotted¹⁹ channels to Marquette and Crandon should create no such inference.

CONCLUSION

It is clear that Scanlan's Marquette Application does not fit into the simple framework established by the Commission's Television Duopoly Rule and Inconsistent and Multiple Application Rules, because the facilities proposed by that application may not be commonly owned with the facilities proposed by Scanlan's Ishpeming Application or, absent a waiver

18. Scanlan's Opposition also makes much of the fact that William Kring, a current officer of the Cadillac and Sault Ste. Marie licensee, is a mutually exclusive applicant with the Ishpeming Application. That a current employee/officer of a television-owning entity seeks to become an owner himself seems far from invidious. To the extent that Scanlan finds it odd "[t]hat Iacobelli can flatly assert what actions Kring will take in the future [regarding disassociating himself from all attributable interests in the Cadillac and Sault Ste. Marie stations] without any supporting documentation from Kring himself raises serious questions," Scanlan must have obviously overlooked the fact that Kring amended his own Ishpeming application to reflect this intent via an amendment signed by Kring and filed with the Commission on April 3, 1996.

19. Scanlan seems to suggest that Iacobelli possessed a bad motive in filing for Channel 19, Marquette, because there were other channels available to be "allotted" to Marquette. This defies logic. In the first instance, Iacobelli is under no duty to seek to have additional channels allotted to Marquette, at the risk of diluting that market for both the Channel 19 applicants and applicants for any subsequently allotted channel, rather than applying for the already-allotted Channel 19 during a window open to filings therefor. Second, filing a petition to deny an application (and filing a supplement in response to ineffectual, late-filed amendments thereto) with which one may be mutually exclusive, when there is a valid legal deficiency in the challenged application, is not only a non-malicious undertaking, it is wise administrative practice.